IN THE

Supreme Court of the United States

October Term, 1975

No. 75-599

APPALACHIAN POWER COMPANY,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

E. DANDRIDGE MCDONALD
THOMAS N. HANNA
Attorneys for Appellee
E-214 State Capitol Building
Charleston, West Virginia 25305

November 28, 1975

ARBETT PRINTING COMPANY, CHARLESTON, W. VA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-599

APPALACHIAN POWER COMPANY,

Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

Appellee, The Public Service Commission of West Virginia, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the Supreme Court of Appeals of West Virginia, on the grounds that it does not present a substantial federal question and that certain federal questions sought to be reviewed were not timely or properly raised and preserved below.

NATURE OF THE CASE AND PROCEEDINGS BELOW

On February 22, 1971 Appalachian Power Company (hereinafter "Appalachian"), a public utility corporation operating in Virginia and West Virginia, filed with the Public Service Commission of West Virginia (hereinafter "Commission"), pursuant to Chapter 24, Article 2, Section 4 of the West Virginia Code, 1931, as amended[1] (hereinafter "Code"), revised tariff sheets stating increased rates and charges of approximately $9,482,000 or 10.5% annually for furnishing electric service to its retail customers throughout West Virginia to become effective April 1, 1971. Assigning the matter Case No. 7083, the Commission, pursuant to Code 24-2-4, suspended the effective date of the revised tariff sheets until July 29, 1971, when they became effective subject to refund with six (6%) percent interest under a $9,000,000 bond, and initiated an investigation into the reasonableness of the proposed rates and charges.

Evidentiary hearings were held before the Commission on April 9, July 11, July 12, July 13, October 17 and December 10, 1973, at the close of which the matter was submitted for decision, subject to the filing of briefs. The last brief, Appalachian's reply brief, was filed April 1, 1974.

On September 16, 1974 the Commission entered an order directing Appalachian, *inter alia*, to "cease and desist its practice of 'repricing' coal purchased from affiliated interests for inclusion in the Fuel Adjustment Clause."[2] Appalachian presented to the Commission its

[1]Reprinted in Appellant's "Appendix to Jurisdictional Statement" (hereinafter "Appendix") at 91-93.
[2]Appendix at 1-2.

Petition to Suspend and Reconsider the order on September 24, 1974, which was denied by Commission order entered October 18, 1974.[3] No judicial review of these two orders was sought until April 7, 1975.

On January 31, 1975 the Commission entered an order[4] which granted Appalachian an increase of $1,321,522, or about 14% of the total amount sought. On February 7, 1975 Appalachian timely filed with the Commission a Petition for Rehearing, Reopening of the Record, and Reargument pursuant to Rule 19(a) of the Commission's Rules of Practice and Procedure,[5] and evidentiary hearings along with oral argument were held on February 21 and March 7, 1975. By order entered March 21, 1975 the Commission, *inter alia*, granted Appalachian's petition to the extent of allowing a reopening of the record to receive evidence of its actual operating experience for the period January 1, 1974 through March 31, 1975.[6]

On April 7, 1975 Appalachian presented its Petition for Suspension and Appeal to the West Virginia Supreme Court of Appeals, which, after oral argument on April 22, 1975, denied said petition by order entered June 23, 1975.[7] A subsequent Motion for Reconsideration, filed July 23, 1975, was denied by that court by order entered July 29, 1975.[8] Appalachian's appeal to this Court followed.

ARGUMENT

The Commission will respond to the "questions presented" on pages 5-7 of Appalachian's Jurisdictional

[3]Appendix at 3-4.
[4]Appendix at 5-54.
[5]Appendix at 95-96.
[6]Appendix at 62-71. The reopened case is designated Case No. 7083 (Reopened).
[7]Appendix at 72-73.
[8]Appendix at 74.

Statement *seriatim;* however, the first and second questions are related and will be considered together.

I. IT IS NO VIOLATION OF CONSTITUTIONAL RIGHTS TO MAKE RATES FOR THE PERIOD JULY, 1971 THROUGH DECEMBER, 1973 BASED ON AN ADJUSTED 1970 TEST YEAR BY ORDER ENTERED IN JANUARY, 1975.

The gist of Appalachian's position is that it has a federal constitutional right under the fourteenth amendment to present evidence of actual operating results during the period July 29, 1971, when its requested rates became effective under bond subject to refund, and December 31, 1973, the end of the period during which the rates at issue were made final.

This Court will note at the outset that following entry of the Commission's January 31, 1975 order Appalachian immediately requested a rehearing which was granted. Two full days of testimony and arguments were had which confirmed "the Commission's belief that its prior orders in this case were correct."[9] Nevertheless, sufficiently substantial questions were raised as to Appalachian's financial integrity and ability to attract capital under the "debt service coverage test" that the Commission reopened the record to consider actual results for the period beginning January 1, 1974. The originally requested rates were allowed to remain effective during the period covered by the reopening.[10]

Substantially all of Appalachian's presentation during the post-decisional proceedings was directed at the effect

[9]Appendix at 63.

[10]Hearings are presently scheduled to resume in Case No. 7083 (Reopened) on January 12, 1976.

the January 31, 1975 order had on its ability to attract capital *currently* (Tr. February 21, 1975 at 12-21, 135-141); there is not the slightest suggestion in the record that the finally approved rates for 1971 through 1973 were not "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital" during that period. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). To the contrary,

> The issue of adequate debt service coverage to enable Appalachian to raise necessary new capital in 1975 from investors depends on Appalachian's income and expenses for 1974 and early 1975. Appalachian has already raised money from investors in 1971, 1972, 1973 and 1974, with what must have been adequate debt service coverage. (Tr. March 7, 1975 at 58-59).[11]

Since Appalachian was able to attract capital during 1971-1974,[12] and since the Commission has already reopened the record to assure its ability to attract capital in 1975, the constitutional tests under the fifth and fourteenth amendments have been fully met.

> . . . [I]f the rate permits the company to operate successfully and to attract capital all questions as to "just and reasonable" are at an end so far as the investor interest is concerned.

FPC v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 607 (1942) (Black, Douglas, Murphy, JJ., concurring); *accord, FPC* v. *Hope Natural Gas Co., supra,* 320 U.S. at 602.

[11]March 21, 1975 order, Appendix at 66.

[12]On February 26, 1974 Appalachian sold $50 million in bonds with a pro forma interest coverage ratio of 2.09 (Tr. March 7, 1975 at 59). It also sold $40 million in long-term bonds on April 22, 1975 and $50 million in long-term bonds on May 19, 1975.

Appalachian relies on several cases cited in its Jurisdictional Statement at 26 to support its contention that the Commission, before ordering refunds, must examine the company's actual results during the refund period. But in each of the cases cited, the respective commissions had before them in the record audited or at least proffered evidence of actual operating results which was ignored when the refunds were ordered. *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 2)*, 294 U.S. 79, 81 (1935); *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151, 162, 163 (1934); *Williams* v. *Washington Metropolitan Area Transit Commission*, 415 F.2d 922, 945 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969); *New York Telephone Co.* v. *New York Public Service Commission*, 29 N.Y. 2d 164, 166, 272 N.E. 2d 554, 556 (1971). Here, not only has Appalachian failed to present such evidence or even to suggest that its rate of return was lower during the refund period than that ultimately allowed by the Commission, but also the Commission has agreed to reopen the record to look at actual 1974 results, allowing the full amount of the requested increase to remain in effect during the investigation.

Notably absent from Appalachian's Jurisdictional Statement is any mention of the fact that the company failed to secure any rate relief during the period in question in Virginia, where about half its retail operations are conducted (Tr. February 21, 1975 at 42-43, 47, 60). West Virginia consumers may fairly be asked to shoulder their share of the responsibility for maintaining Appalachian's financial integrity, but they cannot be expected to fulfill the responsibilities of non-jurisdictional customers.[13]

[13]Debt service coverage figures are normally developed on a total company basis. Adequate coverage thus depends on rate relief in each jurisdiction in which the company operates.

Appalachian's argument that the Commission erred in consulting its annual reports to determine debt service coverage ratios for 1972 and 1973 is ill-founded and ignores several important points. First, the selection of 1970 as a test year was made by Appalachian, not by the Commission (Tr. February 21, 1975 at 29), and it was Appalachian's failure, not the Commission's, to update the record for later periods. In other words "at the time of the 1973 hearing, Appalachian could have elected to prove its case by using 1971, 1972, or a twelve-month period ending in early 1973, or some other appropriate twelve months' period to be chosen as a representative test period. Appalachian elected not to do so."[14] Second, Appalachian not only had the opportunity to present updated evidence throughout the hearings in 1973 (or to file a whole new case), but also was virtually invited to do so at a hearing held December 10, 1974 (*see* Chairman Smith's reference to Rule 19 (a) (2) of the Commission's Rules of Practice and Procedure, Tr. December 10, 1974 at 12; *see also* Tr. February 21, 1975 at 35, 38, 45, 54, 58; Tr. March 7, 1975 at 13-18). Appalachian, under the West Virginia statute, Code 24-1-1 *et seq.*, like utilities subject to the Natural Gas Act, 15 U.S.C. §§717 *et seq.*, and the Federal Power Act, 16 U.S.C. §§824 *et seq.*, has the privilege of initially establishing rates by its own action. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Responsibility for its failure to do so cannot be placed upon the regulatory agency. Third, the debt coverage figures for 1972 cited by the Commission in its order *were* a part of the record, since the cost of capital evidence in the case was based on year-end 1972 figures (Appalachian's Exhibits 26 and 27; Tr. April

[14]Appendix at 65.

4, 1973 at 61-62); it was only because Appalachian failed to submit 1973 data that the Commission turned to the annual reports. This Court has stated, and the principle applies squarely to this case:

> No contention is made here that the information was erroneous or was misunderstood by the Commission, and no contention is made that the Company could have disproved it or explained away its effect for the purpose for which the Commission used it. The most that can be said is that the Commission in making its predictive findings went outside of the record to verify its judgment by reference to actual traffic [in this case, debt coverage] figures that became available only after the hearings closed. It does not appear that the Company was in any way prejudiced thereby, and it makes no showing that, if a rehearing were held to introduce its own reports, it would gain much by cross-examination, rebuttal, or impeachment of its own auditors or the reports they had filed. Due process, of course, requires that commissions proceed upon matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal. But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties. The process of keeping informed as to regulated utilities is a continuous matter with commissions. We are unwilling to say that such an incidental reference as we have here to a party's own reports, although not formally marked in evidence in the proceeding, in the absence of any showing of error or prejudice constitutes a want of due process.

Market Street Railway Co. v. *Railroad Commission of California*, 324 U.S. 548, 561-562 (1945); *accord, United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 530 (1946).

West Ohio Gas Co. v. *Public Utilities Commission of Ohio (No. 1)*, 294 U.S. 63 (1935), cited by Appalachian, is clearly distinguishable from this case on the grounds that in *West Ohio*, "opportunity did *not* exist to supplement or explain the annual reports as to the distribution of the expenses in the neighboring communities" which the commission there had relied on,[15] while here, every opportunity existed at the post-decisional hearings for Appalachian to criticize, amend or otherwise explain the annual reports data considered by the Commission. It never availed itself of the opportunity, nor has it suggested or proffered evidence of any possible prejudice.

Appalachian complains that the Commission's reliance on a stale test period, together with its refusal to reopen the record, violates its fourteenth amendment due process guarantees. However, use of a stale test period does not alone mandate a rehearing, and a refusal to grant rehearing to consider more recent data than is in the record is not necessarily error. "Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene." *United States* v. *Pierce Auto Freight Lines, Inc., supra*, 327 U.S. at 536; *accord, Radio Corp. of America* v. *United States*, 341 U.S. 412, 420 (1951).

This Court has recently reaffirmed the principle that it will decline "to require reopening of the record, except in the most extraordinary circumstances," *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974), explaining at 294-295 that:

> We appreciate the difficulties that arise when the lapse between hearing and ultimate decision

[15] 294 U.S. at 70; emphasis supplied.

is so long. . . Nevertheless, we have always been loath to require that factfinding begin anew merely because of delay in proceedings of such magnitude and complexity. To repeat what was said in *ICC* v. *Jersey City*, 322 U.S. 503, 514-515 (1944):

"Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body."

See also Northern Lines Merger Cases, 396 U.S. 491 (1970); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 50-51 (1936); *Illinois Commerce Commission* v. *United States*, 292 U.S. 474 (1934); *United States* v. *Northern Pacific Railway Co.*, 288 U.S. 490, 494 (1933).

If an appellant has a heavy burden to convince a court that the administrative record ought to be reopened solely because of "regulatory lag," *a fortiori* that burden becomes even greater when the administrative tribunal has

already agreed to reopen for a significant portion of the lag period, as is the case here.

Were a federal constitutional right established which required in every case reopening of an administrative record of utility regulatory proceedings to receive actual results of post-test year operations, the use of the test year as a ratemaking device would be severely restricted if not totally abolished since the record would continually have to remain open to receive the latest data up to the time of the decision. Such a result would be disastrous to the regulatory process. *ICC* v. *Jersey City, supra*, 322 U.S. at 514; *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra*, 419 U.S. at 296.

Moreover, to reopen this record now for the 1971-1973 period would virtually "guarantee" Appalachian earnings at a specific level, a result which is contrary to constitutional principles of regulation, which are to afford an *opportunity* to earn a fair return. *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission*, 262 U.S. 276, 291 (1923) (Separate opinion of Brandeis & Holmes, JJ.); *FPC* v. *Natural Gas Pipeline Co., supra*, 315 U.S. at 590.

The Commission in this case recognized that the length of these proceedings together with the stale record could be prejudicial to Appalachian and gave it the opportunity to "spread the facts of the lag period upon the record."[16] In addition the Commission took note of the lag period in reaching a judgment on a proper rate of return allowance by examining and considering post-test year "trends in debt and equity financing; growth of capacity and anti-

[16] Appendix at 18.

pollution facilities; inflation and other elements of risk," and a number of other factors.[17] Indeed, the Commission specifically provided that "inflationary trends are taken care of in the circumstances of this proceeding by a higher level of the rate of return allowed by the Commission than would otherwise be the case in the absence of inflation."[18]

II. NEITHER PREJUDICE NOR APPEARANCE OF IMPROPRIETY ARISES FROM STAFF COUNSEL'S ROLE IN THIS CASE.

During the post-decisional proceedings in this case Appalachian raised a question concerning the propriety of the role of the Commission's staff counsel in this case. Mr. McDonald initially appeared for Appalachian Research and Defense Fund, Inc. and the Mercer County Economic Opportunity Corporation, representing residential low income consumers (Tr. April 9, 1973 at 8-9), and participated in that phase of the hearing at which Appalachian's witnesses and the staff's allocation witness testified and were cross-examined.

Aside from cross-examination, the only evidence adduced by Mr. McDonald were five exhibits which attempted to show certain generating costs and which were sufficiently rebutted by Appalachian to lead the Commission to refer to "a failure on the part of the intervenors to come forward with adequate proof . . . ."[19]

On or about December 1, 1973, Mr. McDonald joined the legal staff of the Commission[20] and thus did not participate in the cross-examination of staff's accounting

[17]Appendix at 27-28.
[18]Appendix at 32.
[19]Appendix at 40.
[20]Appendix at 7.

witnesses, which took place on December 10, 1973. Thereafter, he, together with the Commission's general counsel and assistant general counsel, prepared the brief on behalf of the staff, which was filed March 5, 1974. Appalachian's reply brief, filed on April 1, 1974, did not mention the matter.

Appalachian first raised a question as to Mr. McDonald's "dual" role in its Petition for Rehearing filed February 7, 1975, even though Appalachian's trial counsel later stated that shortly after the staff brief was filed in 1974, he had been called by all three of the then commissioners and the assistant general counsel and "went through the thing to a considerable extent" (Tr. March 7, 1975 at 5). Counsel further stated that "as far as I personally was concerned, I was willing to accept the statements that had been made to me as something that I would consider closed" (*Id.* at 6), that "I saw nothing in the staff brief that was not pretty much down the line with the staff recommendations," and that "I was satisfied that no material harm had been done to my client" (*Id.* at 11).

At no time has Appalachian suggested that there was any breach of the attorney-client relationship in counsel's role, or that there has been a violation of the letter or spirit of the Code of Professional Responsibility or Disciplinary Rules, or that the residential intervenors' position was adverse to that of the staff so as to be prejudicial to either party, or that it has been specifically harmed by Mr. McDonald's actions. An examination of staff's brief indicates that staff counsel made little or no departure from the position of the staff's accounting, cost of capital and allocation witnesses. In fact, the brief recommended a higher rate of return than the staff cost of capital wit-

ness in order to insure proper debt service coverage for the company.

From neither *General Motors Corp.* v. *New York*, 501 F.2d 639 (2d Cir. 1974), a case which turned on the interpretation of Disciplinary Rule 9-101 (B) (which clearly is not applicable here), nor from any other case or authority cited by Appalachian can it be concluded that there was anything improper, either in substance or appearance, in law or in ethics, from Mr. McDonald's participation in this case.

III. THE COMMISSION'S ORDERS OF SEPTEMBER 16 AND OCTOBER 18, 1974 DID NOT DEPRIVE APPALACHIAN OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW; FURTHERMORE, THEY WERE FINAL ORDERS WHEN ISSUED AND THIS APPEAL IS NOT TIMELY TAKEN.

By order entered July 24, 1974, the Commission, on its own motion, initiated an investigation of the fuel adjustment clauses of electric utilities, including that of Appalachian, which investigation was docketed as Case No. 7945.[21] Appalachian or its subsidiary companies mines approximately twenty-five percent (25%) of the coal used by it for generation, and historically the cost of this "captive coal" was above the cost of market coal. Historically also, the Commission has prohibited Appalachian from recovering the excess cost of captive over market coal for fuel adjustment clause purposes. However, during 1974 when coal prices escalated, the cost of market coal rose above Appalachian's cost of captive coal and Appalachian thereupon repriced its captive coal up to market for purposes of inclusion in the fuel adjustment clause. Thus, it automatically passed along to its customers higher coal costs than it was actually incurring.

[21] *See* Appendix at 13-14.

The staff discovered these facts during its investigation and brought them to the attention of the Commission, which on September 16, 1974, issued the cease and desist order complained of.[22] The facts of this matter were fully brought out by staff testimony at the initial hearing in Case No. 7945 two days later, on September 18, 1974, and at later hearings in September, October and November, at all of which Appalachian was present and took an active part, it cross-examined the staff evidence and presented its own direct and rebuttal evidence. It has had a full and fair hearing on the question, but did not sustain its burden of proving that the practice engaged in was reasonable or lawful. Accordingly, its Petition for Rehearing was denied on October 18, 1974.[23]

Appalachian apparently complains of the Commission's considering the evidence in Case No. 7945 in this case, Case No. 7083, because the cease and desist order was entered in this docket. However, it was in this case that Appalachian's fuel adjustment clause was effective under bond and in this case that the order was properly entered. This Court has previously commented on the "legal version of the scriptural injunction against letting one's right hand know what one's left hand may be doing" by stating "the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result." *United States* v. *Pierce Auto Freight Lines, Inc., supra,*

[22] Appendix at 1-2. The order did not require any refunds since staff's study covered only 1974 and the rates then in effect were still subject to final approval. There being no refund ordered, Appalachian was not "deprived of property" in any sense of the word.

[23] Appendix at 3-4.

327 U.S. at 529, 530. In this case at no time has Appalachian contended that it was *not* repricing its captive coal; its objections have always been either procedural or that the practice was not prohibited by the language of the fuel adjustment clause.

In any event, after the denial of Appalachian's Petition for Rehearing, Appalachian had thirty (30) days to appeal the same to the West Virginia Supreme Court of Appeals,[24] which it failed to do. It also failed to file a Notice of Appeal and Jurisdictional Statement with this Court within the time required by Rules 10, 11 and 13 of the Rules of the Supreme Court of the United States, and thus has utterly failed to preserve the question for appeal. "There being no appeal from that order within the time prescribed by law, it became binding on the company. . . ." *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 1), supra,* 294 U.S. at 66.

IV. WEST VIRGINIA CODE CHAPTER 24, ARTICLE 5, SECTION 1, IS NOT UNCONSTITUTIONAL ON ITS FACE OR AS APPLIED; FURTHERMORE, THE QUESTION IS NOT TIMELY RAISED HERE.

The first time any question of the constitutionality of Code 24-5-1 was specifically raised was in a pleading styled "Amendment and Revision of Motion for Reconsideration and Petition for Rehearing" tendered by Appalachian to the West Virginia Supreme Court of Appeals on July 29, 1975, thirty-six (36) days after that Court's order was entered denying Appalachian's petition for suspension, appeal and review of the Commission's orders and twenty-nine (29) days after Appalachian's Notice of Appeal was filed with that court on June 30,

[24]Code 24-5-1, reprinted in Appendix at 94.

1975.[25] The question was raised neither in Appalachian's initial petition for suspension, appeal and review, nor in its note of argument in support thereof, nor in oral argument before the court on April 22, 1975, and thus could not have been preserved in its Notice of Appeal.

Rule XIII of the Rules of Practice in the Supreme Court of Appeals of West Virginia[26] does not contemplate rehearing of a *denial* of review by the Supreme Court of Appeals of a Public Service Commission order, a fact which is apparent both from a reading of the rule, which calls for "reargument" and "notice" thereof to the attorneys of record, neither of which took place here, and from the court's brief order of July 29, 1975, in which the court was "of opinion not to consider" the motion "as not timely filed."[27] Not having properly presented the question to the West Virginia Supreme Court of Appeals below, Appalachian cannot now raise it in this Court. *Head* v. *New Mexico Board of Examiners,* 374 U.S. 424, 432 (1963) (footnote 12).

Even if the question had been properly raised below and preserved here, the mere fact that the statute permits discretionary rather than mandatory review of a Commission rate order does not render it constitutionally defective, even if constitutional questions are presented in the petition for suspension. *Alabama Public Service Commission* v. *Southern Railway Co.,* 341 U.S. 341 (1951).

[25]Appalachian first filed a Notice of Appeal on June 30, 1975 (Appendix at 75-77) and filed a second Notice of Appeal on October 14, 1975 (Appendix at 78-80). The latter filing was more than 90 days after the West Virginia Supreme Court of Appeals' order of June 23, 1975, and thus out of time. Its "Motion for Reconsideration" did not toll the running of the 90-day period since such a pleading is not permitted by the Rules of the Supreme Court of Appeals. See discussion at n. 26, *infra.*

[26]Appendix at 97.

[27]Appendix at 74.

While it may be true that

> When dealing with constitutional rights . . . there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it,

St. Joseph Stock Yards Co. v. *United States, supra,* 298 U.S. at 77 (Brandeis, J. concurring), it does not follow that such opportunity must amount to a virtual trial *de novo. Charleston* v. *Public Service Commission,* 110 W.Va. 245, 248, 159 S.E. 38, 40 (1931); *Preston County Light and Power Co.* v. *Public Service Commission,* 297 F. Supp. 759, 765, 766 (S.D. W.Va. 1969). A constitutional challenge to Code 24-5-1 almost identical to that made by Appalachian here has recently been presented to and rejected by a federal court. *Preston County Light and Power Co.* v. *Public Service Commission, supra* at 766. Appalachian not only had the opportunity to present all its constitutional questions to the court below, but also it availed itself of that opportunity (at least as to several of them) by its petition to the court seeking suspension, appeal and review of the Commission's orders.

CONCLUSION

For all the above reasons, Appellee, The Public Service Commission of West Virginia, urges the Court to grant its Motion to Dismiss or Affirm herein on the grounds that no substantial federal questions have been presented and that certain of the matters sought to be reviewed were not timely or properly raised and preserved below.

Respectfully submitted,

E. DANDRIDGE MCDONALD
THOMAS N. HANNA
Attorneys for Appellee
E-214 State Capitol Building
Charleston, West Virginia 25305

November 28, 1975